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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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I

On the argument of this cause, Mr. Justice Frankfurter raised the question, not theretofore urged or considered in the courts below or in this Court, whether the arrest of respondent was unlawful because of the failure of the arresting officer to comply with Section 180 of the New York Code of Criminal Procedure, which provides:

> When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested

is in the actual commission of a crime, or is pursued immediately after an escape.

It seems to have been assumed at the argument that the arrest in this case would have been unlawful under New York law, and that the admissibility of the evidence taken from respondent's person would depend on the question whether the validity of an arrest by a state police officer for a federal crime is governed by the statutes regulating arrest in the state where the arrest is made. It is our view, however, that the arrest of respondent under the circumstances disclosed by this record would be lawful even if its validity is to be determined by the law of New York.

In this case, the evidence discloses that, just before the arrest was made, the state officer and the O. P. A. investigators approached the car in which respondent was sitting, and saw two coupons in the hands of Reed. They asked Reed where he had obtained the coupons and he replied that he had received them from Buttita. Thereupon, the arrest was made. Under these circumstances, it was just as clear to respondent that he was being arrested for complicity in the trafficking of counterfeit coupons as if the officer had made the statement to such effect.[1] That, we

[1] We do not understand that, in any jurisdiction under any rule, an arresting officer would be required to do more than state generally the cause of arrest. Since ancient times an

submit, was sufficient compliance with the requirements of Section 180 to render the arrest lawful under either New York or federal law.

Section 180 requires that an officer making an arrest without a warrant inform the accused of his authority. But it would not be seriously contended that an arrest by a policeman in full uniform would be unlawful merely because he failed to state that he was a policeman. The purpose of Section 180 is "to acquaint the person arrested of the cause of the arrest, not only that he may know whether he is bound to submit, but also that he may know what measures to take to regain his liberty." *People* v. *Marendi*, 213 N. Y. 600, 610. That purpose was fully served by the circumstances under which this arrest was made. The respondent knew as clearly as if he had been told in meticulous detail that he was arrested for dealing in counterfeit coupons.

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officer's power to arrest for a misdemeanor has been limited to misdemeanors committed in his presence. As the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was holding the coupons, it is clear that the officer was arresting for a felony. Certainly, it is not necessary that an arresting officer at the time he makes an arrest cite to the person arrested chapter and verse of the Criminal Code. And certainly, also, a prosecutor's decision to proceed on a lesser offense which has come to light through legal search after a lawful arrest cannot affect the validity of the officer's reasonable belief that the person arrested had committed a felony at the time the arrest was made.

While we have found no New York cases dealing specifically with this subject,[2] decisions in other states, which impose the same requirements as those set forth in Section 180 either by statute or by judicial decision, have held that such requirements were met where the circumstances were sufficient to constitute notice to the person arrested of the authority of the arresting officer and the cause of the arrest. *Morton* v. *State*, 190 Ga. 792, 799; *Allen* v. *McCoy*, 135 Cal. App. 500, 509; *Heinzman* v. *State*, 45 Okla. Crim. 305, 308; *Sanderson* v. *State*, 168 Ala. 109, 116. That such is the rule in New York is suggested, not only by its essential reasonableness, but by the fact that, in this very case, although the circumstances of the arrest were fully developed by the testimony, no point of noncompliance with Section 180 of the Criminal Code was raised either by counsel—members of the New York bar—or by the district judge or the judges of the circuit court of appeals sitting in New York, judges to whose interpretations of state law this Court gives special weight. *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280. It is extremely significant, in our view, that Judge Learned Hand, who spoke

[2] In *People* v. *Marendi*, 213 N. Y. 600, the court noted specifically that there was no arrest but merely detention for the purpose of search without an arrest. In *Snead* v. *Bonnoil*, 166 N. Y. 325, the arresting officers did not purport to arrest the plaintiff, but stated that they wanted to examine the bag which he carried.

for the majority in the present case, did not rest the reversal upon Section 180, though he had been sitting in federal courts in New York for nearly forty years, and has won deserved acclaim as a zealous defender of civil liberties. And it is significant also that the foregoing understanding of the New York rule is confirmed by the circumstance that in *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753, 756, the Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Chase which assumed that the authority of a private citizen to arrest for a federal crime was governed by the statute law of New York, upheld an arrest for conspiracy despite the fact that the opinion specifically noted that the person arrested was not told the reason for his arrest.

As a matter of fact, it is not at all clear that the arrest here does not fall within the specific exception of Section 180 dispensing with the requirement of notice when "the person arrested is in the actual commission of a crime." In our view, respondent was at the time of his arrest actually engaged in the crime of conspiracy. It is to be noted that the agreement between Buttita and Reed had been reached before Reed informed the Government agents of such fact. So the crime of conspiracy had already occurred before Reed withdrew therefrom by turning informer. If there were other persons in that conspiracy, the conspiracy was not terminated by Reed's withdrawal therefrom. *United States* v. *Park Phar-*

macy, supra. And, when respondent was brought along by a known conspirator to the place previously set for the commission of the crime contemplated by that conspiracy, it became evident that the conspiracy did in fact involve persons other than Buttita and Reed, that the conspiracy had in fact continued after Reed's secret withdrawal therefrom, and that respondent was in fact a member of that conspiracy. In view of his presence in the car which was used as a means of furthering the conspiracy to perpetrate the substantive crime contemplated by the conspiracy, we think that the officer had the right to consider the respondent as then and there being engaged in an overt act of conspiracy. This Court, in *Marron* v. *United States,* 275 U. S. 192, 198, recognized that conspiracy is a crime capable of being committed in the presence of officers.[3]

[3] For the purpose of meeting the literal requirements of Section 180, as set forth in the latter part of this argument it would, of course, be necessary to establish that respondent was actually engaged in conspiracy at the time of his arrest. But even if respondent cannot be considered as being engaged in conspiracy at the time of his arrest, in view of the discussion which occurred on the argument of this cause as to the effect of Reed's withdrawal, it seems to us worth noting that the evidence clearly shows that the crime of conspiracy had been committed before Reed's withdrawal, that there was reasonable ground to believe that the crime had continued and that respondent was implicated therein. There was thus ample justification for considering him as implicated in the felony of conspiracy, as well as in the felony of possessing and uttering counterfeit writings.

II

Assuming, however, that the arrest of respondent would have been illegal under the laws of New York if made for a crime created by the laws of New York, it does not follow, we submit, that the arrest of respondent for a federal crime would be illegal under federal law. The validity of such an arrest, must, we think, be determined by general federal principles and not by state procedure.

There is, it is true, no very clear cut decision as to just what law does govern the right to make an arrest without a warrant for a federal crime, even where the arrest is made by federal employees not specifically authorized to arrest by federal statute. There are cases in which circuit courts of appeals have assumed without discussion that the right to arrest for a federal crime in the absence of a specific federal statute conferring the power of arrest is a matter to be determined by state law. E. g., *Cline* v. *United States*, 9 F. 2d 621 (C. C. A. 9); *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753 (C. C. A. 2). The necessity for distinguishing between state and federal law has seldom arisen, since the power to arrest in most cases is the same. This case, however, may make a determination of that issue necessary.

The decisions of this Court, we think, indicate that the right to arrest without a warrant for a federal crime is a matter governed by common

law as interpreted by the federal courts rather than by state statutes. Such seems to have been the assumption of this Court's decision in *Carroll* v. *United States,* 267 U. S. 132, 156–158, even though a state officer accompanied the federal prohibition agents when the search at issue in that case was made. See 267 U. S. at 134. Such a ruling is in line with the repeated holdings of this Court that "federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts." *United States* v. *Murdock,* 284 U. S. 141, 150, and cases there cited. It is particularly appropriate that a federal rule be applied to the law of arrest without a warrant, since the question of the validity of such an arrest arises most frequently in connection with the question of the admissibility of evidence obtained at the time of arrest, and the determination of the admissibility of evidence is a matter peculiarly within the province of federal courts. *McNabb* v. *United States,* 318 U. S. 332, 341. That there is a federal rule of arrest seems to have been the understanding of Congress, for in 18 U. S. C. 53a, quoted at page 16 of our main brief, it embodied the federal rule enunciated in the *Carroll* case in the proviso to that section. For these reasons, we have come to the conclusion that the validity of an arrest without a warrant for a federal crime

is a matter of federal law to be determined by a uniform rule applicable in all federal courts.*

If there is a general federal rule governing arrests without a warrant, then we think it is clear that such a rule governs the action of a state officer arresting an offender for a federal crime, particularly where, as here, the state officer merely lends his aid to federal employees. The arrest of respondent in this cause was in every sense a federal undertaking. The crime was a federal crime; the information about that crime was first conveyed to federal employees, O. P. A. investigators; the arrest was made at their instigation, and the state officer merely accompanied them to assist them in making the arrest. The question at issue in this case is the lawfulness of the arrest for the purpose of determining whether a federal district court properly admitted in evidence documents tending to establish a federal offense. In all its aspects, therefore, the question here is a federal question. In *Byars* v. *United States*, 273 U S. 28, 33, this Court held that where a federal prohibition agent accompanied state officers in making a search pursuant to a state search warrant addressed to state officers, the search nevertheless had to be judged as if the

*Our examination of this problem leads us to withdraw the suggestion set forth in our main brief at pp. 15–16, that the arrest of respondent can be justified under subsection 2 of Section 177 of the New York Code of Criminal Procedure.

federal agent "had engaged in the undertaking as one exclusively his own." See also *Gambino* v. *United States*, 275 U. S. 310, where a state officer acting without federal assistance to enforce a federal crime, was nevertheless held to the standard of the federal, and not the state, courts. In this case, where the state officer was merely assisting federal employees to enforce a federal law, his acts must, we think, be judged by federal law alone.

Assuming that there was probable cause for the arrest, we know of nothing in either the federal decisions or federal statutes which would invalidate an arrest made under the circumstances of this case, if made by a private citizen exercising the power of arrest under federal criminal law. The circumstances under which respondent's arrest was made were clearly sufficient to inform him of the general nature of the crime with which he was charged. It would, indeed, be anomalous to hold that if the O. P. A. investigators had made the arrest as private citizens, the arrest would have been valid, but that it became invalid merely because it was made by a police officer who accompanied the investigators to assist them in making the arrest. We submit that if the arrest would have been lawful if made by federal officers, it was equally lawful when made by a New York state police officer accom-

panying a federal employee to enforce a federal law.[6]

It may be argued that state statutes, such as Sec. 177 of the New York Code of Criminal Procedure, define the powers of a police officer to act as such, and that where a state officer is being used as a peace officer, he has only the power conferred on him by state law. But even if that be the law, it would not follow that state statutes, such as Section 180, governing the manner of making an arrest, would be applicable to an arrest for a federal crime. Section 180 relates to procedure, not to power. We see no reason why state procedure should govern the validity of an arrest for a federal crime.

III

On the argument of this cause, in connection with the Government's alternative suggestion that the search of respondent might be sustained as incident to the search of a moving vehicle reasonably believed to be carrying contraband, Mr. Justice Jackson raised the question whether the logic of the Government's position would not authorize the search of a person who merely happened to be in a house where property was

[6] We wish to emphasize that, as stated on the argument, we do not contend that a private person has the right of search incident to an arrest. But a private person who makes an arrest is under a duty to surrender the person arrested into the custody of peace officers and a search by the peace officer would, of course, be lawful, if the original arrest was lawful.

sought pursuant to a search warrant. In response to that question, we wish to point out that Rule 41 (c) of the Federal Rules of Criminal Procedure, which in this respect merely embodies the prior provisions of the Espionage Act, 18 U. S. C. 613, specifically provides for the naming of the "person or place to be searched." Hence, except of course as incident to a lawful arrest, a person could not be searched pursuant to the search warrant unless named in the warrant. The only possible application of the principle suggested in Point II of our brief is in the case of the search of a moving vehicle reasonably believed to be carrying contraband. And as we pointed out, both in our main brief, and at the argument, we deem the right to search the person, even in such a case, to be limited to the situation where the contraband for which the search is made is of so small a nature that it could easily be concealed on the person.

Respectfully submitted.

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